STATE OF MICHIGAN
IN THE SUPREME COURT

COUNTY ROAD ASSOCIATION OF MICHIGAN and CHIPPEWA COUNTY ROAD COMMISSION,

Plaintiffs-Appellees,

v

GOVERNOR OF MICHIGAN, DIRECTOR OF THE DEPARTMENT OF TRANSPORTATION, DEPARTMENT OF TRANSPORTATION, DIRECTOR OF THE DEPARTMENT OF MANAGEMENT AND BUDGET, DEPARTMENT OF MANAGEMENT AND BUDGET, STATE BUDGET DIRECTOR, STATE TREASURER, DEPARTMENT OF TREASURY, SECRETARY OF STATE, and STATE OF MICHIGAN,

Defendants-Appellants,

and

MICHIGAN PUBLIC TRANSIT ASSOCIATION, ANN ARBOR TRANSPORTATION AUTHORITY, CAPITAL AREA TRANSPORTATION AUTHORITY, and SUBURBAN MOBILITY AUTHORITY FOR REGIONAL TRANSPORTATION,

Intervening Plaintiffs-Appellees,

AREA TRANSPORTATION AUTHORITY,
MICHIGAN ROAD BUILDERS ASSOCIATION and ASSOCIATED UNDERGROUND CONTRACTORS,

Intervenors/Appellants,

/

FOR PUBLICATION
January 13, 2004
9:00 a.m.

No. 245767
Ingham Circuit Court
LC No. 02-000308-CZ

CZ

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APPLICATION FOR LEAVE TO APPEAL

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STATEMENT IDENTIFYING ORDER APPEALED FROM

The Court of Appeals issued an opinion on January 13, 2004 reversing the decision of the Trial Court, which issued a preliminary injunction enjoining the State Defendants from transferring funds from the Comprehensive Transportation Fund to the General Fund pursuant to an Executive Order. Exhibit A.

Intervenors/Appellants request that their Application for Leave to Appeal be granted, the decision of the Court of Appeals reversed, and the Trial Court's decision be reinstated.

GROUNDS FOR APPLICATION FOR LEAVE TO APPEAL

In this case, in an unprecedented display of judicial activism, the Court of Appeals has ignored the plain language of Const 1963, art 9, § 9 and, in order to reach the desired result, found said section to be "ambiguous." In this State, there is a long history of protecting transportation funds from diversion by other interests beginning in the 1920s, culminating in the enactment of Const 1963, art 9, § 9, as amended by the people of this State in 1978. Despite this history and the plain language of Const 1963, art 9, § 9, the Court of Appeals has turned principles of constitutional construction on their head in order to find that the funds at issue are not constitutionally dedicated and are, therefore, subject to the Governor's power to reduce expenditures found in Const 1963, art 5, § 20. This matter involves legal principles of major significance to the State's jurisprudence. In addition, the Court of Appeals has ignored, or twisted for its own purposes, its own precedent and precedent of this Court and its decision is clearly erroneous. Finally, this matter is against the State and involves an issue of significant public interest.

STATEMENT OF QUESTIONS INVOLVED

I. Did the Trial Court abuse its discretion when it concluded that Intervenors/Appellants were likely to succeed on the merits?

The Court of Appeals answers "Yes."

The Trial Court answers "No."

Intervenors/Appellants answer "No."

Defendants/Appellees answer "Yes."

II. Are the Defendants/Appellees barred from raising the issue of "severability" on appeal for failure to raise it with the Trial Court?

The Court of Appeals answers "No."

The Trial Court did not answer this question.

Intervenors/Appellants answer "Yes."

Defendants/Appellees answer "No."

III. Should this Court determine it appropriate to decide Question II, is Defendants/Appellees' "severability" argument meritless?

The Court of Appeals answers "No."

The Trial Court did not answer this question.

Intervenors/Appellants answer "Yes."

Defendants/Appellees answer "No."

IV. Did the Trial Court abuse its discretion when it properly concluded that Intervenors/Appellants would suffer irreparable harm in the absence of an injunction?

The Court of Appeals did not answer this question.

The Trial Court answers "No."

Intervenors/Appellants answer "No."

Defendants/Appellees answer "Yes."

V. Did the Trial Court abuse its discretion when it properly concluded that without the preliminary injunction the public interest would be harmed?

The Court of Appeals did not answer this question.

The Trial Court answers "No."

Intervenors/Appellants answer "No."

Defendants/Appellees answer "Yes."

VI. Did the Trial Court abuse its discretion when it properly concluded that any harm to Defendants/Appellees was outweighed by the harm to Intervenors/Appellants?

The Court of Appeals did not answer this question.

The Trial Court answers "No."

Intervenors/Appellants answer "No."

Defendants/Appellees answer "Yes."

I. INTRODUCTION

Intervenor, the Michigan Public Transit Association ("MPTA"), is an association representing the interests of various Michigan public transit authorities, including the Intervenors, Ann Arbor Transportation Authority ("AATA"), the Suburban Mobility Authority for Regional Transportation ("SMART"), and the Capital Area Transportation Authority ("CATA") (hereinafter collectively "Intervenors"). In their Complaint, Intervenors primarily requested the Trial Court to: (1) declare that Defendant Governor's transfer of $12,750,000 in sales tax revenues designated by law for comprehensive transportation purposes was without authority and in violation of the Michigan Constitution and law; (2) enjoin the Defendants from implementing or attempting to implement any transfers from the Comprehensive Transportation Fund ("CTF") to the General Fund as set forth in Executive Order 2001-9; and (3) order Defendants to restore any funds improperly transferred from the CTF pursuant to Executive Order 2001-9.

In order to preserve their ability to obtain full and complete relief in this matter, Intervenors applied to the Trial Court for a Preliminary Injunction. Based on the application of the four factor test set forth by this Court[1], the Trial Court agreed that a preliminary injunction was necessary to preserve the *status quo* and to protect the Intervenors and the public from the irreparable harm that has and will be caused by the unconstitutional transfer of funds from the CTF to the General Fund as set forth in Executive Order 2001-9. See Exhibit B, Order, and Exhibit C, transcript.

On February 19, 2003, the Court of Appeals granted Defendants' Application for Leave to Appeal in this case, limited to the issues raised in the Application. Exhibit D. The Court of

[1] *Michigan State Employees Ass'n v Department of Mental Health*, 421 Mich 152, 157-158; 365 NW2d 93 (1984).

Appeals also, on its own motion, stayed the Trial Court Order issuing the preliminary injunction pending resolution of the appeal. Exhibit D.

The Court of Appeals reversed the decision of the Trial Court, held that Const 1963, art 9, § 9 was "ambiguous" and that the general sales tax revenues apportioned to the CTF at issue were not constitutionally dedicated. The Court of Appeals thus concluded that the funds in question were not immune from an executive order expenditure reduction pursuant to Const 1963, art 5, § 20. Exhibit A, p 3.

In reaching this decision, the Court of Appeals ignored the most basic principle of constitutional interpretation, which is to give effect to the intent of the people. Instead, in an act of unprecedented judicial activism, the Court of Appeals found Const 1963, art 9, § 9 to be "ambiguous" in order to achieve the desired result. This holding not only effects the funds at issue, but significantly impacts the constitutional jurisprudence of this State and creates unnecessary conflict among the three branches of government.

II. STATEMENT OF FACTS

A. Background and History of Const 1963, art 9, § 9

The development and history of Const 1963, art 9, § 9 is important to the analysis of its operation and the intention of the people that enacted it because that history unequivocally demonstrates that the tax revenues to which it applies are constitutionally dedicated to highway and transportation purposes.[2]

[2] The background and history of Const 1963, art 9, § 9 is set forth in significant detail in *County Road Ass'n of Michigan v Board of State Canvassers*, 407 Mich 101; 282 NW2d 774 (1979).

1. Early Gasoline Tax Statutes Attempt, But Fail, To Protect Revenues From Diversion.

In 1925, the Legislature imposed the first special tax on the sale of gasoline. As originally enacted, § 2 of 1925 PA 2 imposed a 2¢ per gallon tax on the sale of gasoline, and § 11 thereof appropriated these proceeds for the construction and maintenance of public highways. See generally, *Detroit Automobile Club v Secretary of State*, 230 Mich 623, 624; 203 NW 529 (1925). In 1927, the Legislature enacted 1927 PA 150, which increased the tax on gasoline to 3¢ per gallon. Section 19 of 1927 PA 150 preserved the basic principle that the revenues received from this tax were earmarked for highway purposes. In *Moreton v Secretary of State*, 240 Mich 584, 588; 216 NW 450 (1927), the Supreme Court described 1927 PA 150, stating:

> ... The act is a highway finance measure. It provides that the tax collected shall be deposited to the credit of the State highway fund and appropriated from that fund for certain purposes, one of which is the payment of specified amounts to the several counties of the State which are to be expended for the construction and maintenance of highways "under the supervision of the State administrative board, in accordance with the highway laws."

Despite the obvious relationship between the gasoline tax and highways, and the legislative dedication of such tax revenues to highway purposes, there was often pressure from various groups to use these revenues for other purposes. Faced with the financial and economic challenges of the Great Depression in the 1930s, the Legislature responded to pressures to divert the gasoline tax revenues to other purposes. For example, on May 23, 1933, the Legislature passed 1933 PA 81, which added subsection (2-a)[3] to Section 19a of 1927 PA 150, expanding the

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[3] As so amended, § 19a (2-a) provided:

> If there be no application of funds for the above purposes, or if there be monies remaining over and above such application, then the monies so available may be used for the payment of indebtedness heretofore incurred through the issue of calamity bonds or other emergency welfare relief obligations heretofore issued or may be used to supplement any so-called welfare relief funds provided by the state or federal governments to the counties or political subdivisions thereof. The

uses to which the gasoline tax revenues could be used to include: (1) payment of calamity bonds and other emergency welfare relief obligations; and (2) supplementation of any so-called welfare relief funds. In 1933 PA 107, the Legislature added subsection (5)(e)(3)[4] to Section 19a of 1927 PA 150, again expanding the uses to which the gasoline tax revenues could be used to include the maintenance and improvement of county parks.

2. By Initiative Petition And Voting In 1938, The Electorate Elevate To Constitutional Stature The Dedication Of Gasoline And Weight Taxes To Highway Purposes.

The legislative diversions in the early 1930s of the gasoline tax revenues from highway purposes (along with other unsuccessful attempts at other diversions) led the people of the State

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> allocation of monies available under this section for welfare relief shall be as determined by the board of county road commissioners subject to the approval of the board of supervisors. The allocation of monies available under this subdivision for the payment of bonds or other welfare relief obligations as between political subdivisions of the county shall be as determined by the board of supervisors: Provided, however, that neither this sub-section nor the allocation of funds provided thereby shall be effective after January one, nineteen hundred thirty-four. (Emphasis added)

[4] As so amended, § 19a (5)(e) provided:

> The portion of said funds apportioned to the county under the provisions of subsection (5) of this section shall be used and expended for the following purposes and in the following order of priority, the amount to be devoted to any one of the following purposes to be determined by the board of county road commissioners, subject to the approval of the board of supervisors, viz.:
>
> 1. The repair and maintenance of county roads and bridges in such amounts as shall be determined by the board of county road commissioners.
>
> 2. The maintenance of additional mileage of township roads selected and determined upon in accordance with the provisions of the McNitt-Holbeck-Smith act and the widening, improvement and construction of county roads subject to the approval of the board of supervisors.
>
> 3. The maintenance and improvement of county parks in such amounts as shall be determined by the board of county road commissioners subject to the approval of the board of supervisors. (Emphasis added)

of Michigan to propose, by initiative petition, an amendment to the Constitution to expressly prohibit such diversions. Although there is little or no "legislative history"[5] of the 1938 initiative petition, Delegate Powell to the Constitutional Convention of 1961 described it, stating:

> ... I am sure that there is considerable agreement that highway funds are special user tax revenues and are totally different than general tax revenues. Using all highway tax revenues for highway purposes is not diversion, but rather it's anti-diversion. It provides for the preservation of certain funds for the purposes for which they were intended....
>
> The anti diversion provision of our state constitution which dedicates all highway tax revenues to highway purposes was placed in our constitution as a result of initiatory petitions which were circulated in 1938. The question as placed on the ballot that year was as follows, and I want you to check the exact language of what it was the people had in front of them as they went to the polls and voted on the matter:
>
> > Shall the constitution be amended to guarantee that gasoline and motor vehicle license plate taxes paid by motorists be used for highway, roads and streets?
>
> The electorate answered that question voting as follows: 813,289 yes; 529,859 no. This is a majority of 283,430 for the amendment. It is significant that this amendment carried in each of the 83 counties in the state, and in the subsequent 24 years there has been no effort to repeal or amend this provision. [Record of the Constitutional Convention of 1961, p 2632.]

The 1938 amendment added art 10, § 22 to the 1908 Constitution. It provided:

> All taxes imposed directly or indirectly upon gasoline and like fuels sold or used to propel motor vehicles upon the highways of this state, and on all motor vehicles registered in this state, shall, after the payment of the necessary expenses of collection thereof, be used exclusively for highway purposes, including the payment of public debts incurred therefore, and shall not be diverted nor appropriated to any other purpose; provided, the legislature may provide by law a method of licensing, and regulating motor vehicle dealers and operators; and may prescribe charges sufficient to pay for the enforcement thereof. The provisions of this section shall not apply to the general sales tax, the use tax, the fees and taxes collected under the auto theft and operators' and chauffeurs' license laws which are used for regulatory purposes; the application fees and mileage fees appropriated to the Michigan Public Utilities Commission by Act No. 254 of

[5] Citations to the speakers of the Constitutional Convention for guidance was recognized by this Court in *Regents of University of Michigan v State*, 395 Mich 52, 59-60; 235 NW2d 1 (1975).

> 1933; the franchise or privilege fees payable generally by corporations organized for profit; nor to ad valorem taxes paid generally by manufacturers, refiners, importers, storage companies, and wholesale distributors on gasoline and like fuels held in stock or bond, and by manufacturers and dealers on motor vehicles in stock or bond. (Emphasis added.)

This provision elevated to constitutional status the previous legislative allocation of gasoline tax revenues exclusively for highway purposes.

The 1938 amendment did not, however, completely stop attempts to divert gasoline tax revenues from highway purposes. Delegate Powell noted:

> Despite the fact that this amendment has been for all these years a part of our constitution, there has been constant pressure to siphon off substantial portions of highway revenues for purposes not directly connected with highway construction or maintenance. If it were not for this provision ... all sorts of plausible ways might be found to use liberal chunks of the road money.... [Record of the Constitutional Convention of 1961, p 2632.]

Delegate Powell then gave an example of such pressure by quoting a March 17, 1958 Opinion of Attorney General Paul L. Adams concluding that a proposal to use gasoline tax revenues to fund all or a part of the salaries and expenses of members of the Michigan State Police who served as the uniformed highway patrol would violate Const 1908, art 10, § 22.

In 1951, the Legislature enacted Public Acts 51 through 55, which were the predecessors of the 1978 Public Acts discussed below. These Acts raised the gas tax from 3¢ to 4½¢ per gallon and appropriated the funds thereof exclusively for highway purposes. See *County Road Ass'n,* 407 Mich at 114. See also *Michigan Good Roads Federation v State Board of Canvassers*, 333 Mich 352; 53 NW 481 (1952), MCL 247.651, *et. seq.*

3. The Delegates To The Constitutional Convention Of 1961 And The Electorate In 1963 Reaffirm The Constitutional Dedication Of Gasoline Tax Revenues To Highway Purposes.

When the Constitutional Convention of 1961 convened, the delegates were asked to address the existing constitutional dedication of motor vehicle revenues for highway purposes.

Issues regarding this specific provision were not viewed in isolation, but as part of the larger issue of whether the constitutional earmarking of various revenues for specific purposes[6] caused, or contributed to, the fiscal crisis facing the State in the late 1950s. Delegate Mrs. Cushman spoke in support of deleting this provision from the Constitution, stating:

> One of the chief reasons we are here today is because of the 1959 financial crisis in Michigan. The forecast is for a debt of $100 million for the state by the end of this fiscal year. The people of the state expect us to do something to solve these problems.
>
> This section continues a rigid system of financial management which was one of the chiefs causes of our state's problems. I therefore urge you to think carefully before you vote, and I urge you to vote for the amendment to delete this section in the interest of a flexible constitution and good financial management. [Record of the Constitutional Convention of 1961, p 781.]

The delegates opposed to Mrs. Cushman's proposed deletion explained the purposes and effects of the constitutional provision. Delegate Stafseth stated:

> Now, with this in mind, when you come to the proposition of Committee Proposal 38, which is fundamentally the same as it has been since 1938, you will note that in this proposal the earmarking only says that these taxes shall be used for highway purposes. It gives the legislature the latitude to raise the gas or weight tax to increase revenue; to maintain them or lower them. ...
>
> ...In the case of the gas and weight tax, there are currently 27 states that have constitutional provisions that earmark these funds. ... Currently there are 10 states that have statutory provisions which require that these funds are used for highway purposes.
>
> * * * * *
>
> Now, the committee, when they considered this problem, unanimously approved the principle of earmarking gas and weight tax for highway purposes. [Record of the Constitutional Convention of 1961, p 780.]

Delegate Stafseth explained part of the rationale underlying the earmarking of fuel and weight

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[6] For example, Const 1908, art 10, § 23 earmarked ½¢ of the sales tax levy for return to local governments, and 2¢ of the sales tax levy for school districts. Const 1908, art 11, § 12 appropriated proceeds from escheat lands to the support of the primary schools. Const 1908, art 11, § 13, required the Legislature to appropriate proceeds from the sale of salt springs lands to

revenues for highway purposes, stating:

> First I think it would be well to explain to the members of the committee that in the highway industry the engineers look at the highway system as a utility, much like a railroad or a water utility, and in their thinking they have attempted to derive a tax structure that would be directly related to the amount of use that you make of the highways.
>
> There are 2 major factors that contribute to the wear and tear of highways. One is the weight of the vehicle, and the other is the amount of use or the frequency or the amount of traffic on the highways. So in the design of the tax structure, you can plainly see if you have a gasoline tax that is on a per gallon use basis, you have a tax that will take care of the frequency.
>
> In the case of the weight tax or the licensing fee, you have a tax structure that is based proportionately on the amount of weight of the vehicle. Currently now we have a 35 cents per hundred pound license fee, so the larger the truck the greater the tax they pay which is related to the weight, and weight is one of the major factors in the deterioration of the highway. There is one other thing: the weight tax can be considered quite similarly to the fee that you have in the case of a water utility system. You have a ready to serve charge or a meter charge, so a license fee is much the same as that for this utilitarian purpose.
>
> There is one thing that I think we have to bear in mind, and that is since world war II we have been very mindful of the fact that highways do have a very realistic life span. They do wear out. The more the use the shorter the span. This is particularly true when you get in around large cities, where I imagine the pot holes are in pretty good shape this weekend.
>
> Now, with this in mind, when you come to the proposition of Committee Proposal 38, which is fundamentally the same as it has been since 1938.... [Record of the Constitutional Convention of 1961, p 780 (emphasis added).]

Delegate Staiger explained some of the purposes and advantages of Const 1963, art 9, § 9, stating:

> Number one, on highway earmarking, the rate is not specified in the constitution. It merely says that all gas and weight taxes shall be used for highway purposes. Now, when you analyze that, this means that the flexibility is there with the legislature to set what the gas and weight taxes shall be. If the legislature determines that too much money is going to roads, it can lower the rate. If there

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the agricultural college. Const 1908, art 11, § 14 required that all fines assessed by municipalities be exclusively applied to the support of local libraries.

is not enough, it can raise it. But the basic responsibility is still left to the legislature.

* * * * *

...[T]here are some good points that flow from earmarking. Number one – by its nature, highway planning is long range in nature. Having set revenues for that purpose aids in this long range planning. Also, from the standpoint of the financing rates, highways take large capital investments. By having the constitutional designation as far as gas and weight taxes, they have been able to finance at lower rates of interest than they would otherwise, short of general obligation, which is something we haven't been willing to go to, but it certainly is better than it would be by a statutory pledge of revenues for that purpose.[7] [Record of the Constitutional Convention of 1961, p 782.]

Delegate Sterrett echoed these concerns:

> First of all, we have to realize in order to have highways, we must have some underwriter underwrite bonds so we can get some money. Then we pay back these bonds. And the bond underwriters – and I won't mention any specifically – have said that without the diversion of this tax for highway funds, it would be practically impossible for the state of Michigan to get any bonds for new highways in the present fiscal state that it is in. [Record of the Constitutional Convention of 1961, p 783.]

Addressing the background of the provision, Delegate Farnsworth stated:

> Now, we have been through this fight years and years ago when our roads were mud and we finally got the taxes passed, and we finally found that they were not getting on the highways; they were diverting them to other uses. This is a specific tax for a specific purpose. The result of the amendment will be to see that the funds go to that particular purpose, and that is good roads in Michigan. [Record of the Constitutional Convention of 1961, p 783.]

The drafters of the 1963 Constitution preserved the constitutional dedication of such revenues by reenacting Const 1908, art 10, § 22, as Const 1963, art 9, § 9. Although the 1963 Constitution deleted the phrase "and shall not be diverted nor appropriated to any other purpose," the 1963 revisions simply restated the provision more concisely, without intending any change in its meaning. Addressing the revisions made by the Committee on Style and Drafting, Delegate

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[7]The last paragraph of Const 1963, art 9, § 9, as added in 1978, permits the Legislature to authorize the issuance of indebtedness pledging the constitutionally dedicated funds, which obligations are not to be construed as evidence of state indebtedness.

Brake explained:

> You will notice that the committee on style and drafting has really cut us up here, but we think they have left everything that is needed; that it means all that it meant before and is in much better constitutional language. [Record of the Constitutional Convention of 1961, p 2632.]

As passed by the Convention and presented to the voters in 1963, proposed article 9, § 9, stated:

> All specific taxes, except general sales and use taxes and regulatory fees, imposed directly or indirectly on fuels sold or used to propel motor vehicles upon highways and on registered motor vehicles shall, after the payment of necessary collection expenses, be used exclusively for highway purposes as defined by law.

The Convention Comment[8] to proposed article 9, § 9 read:

> This is a revision of Sec. 22, Article X, of the present constitution and retains earmarking of gas and weight taxes for highway purposes. The only significant change is accomplished through the addition of the words "as defined by law" following "highway purposes" at the conclusion of the section. This gives the legislature power to define and limit the meaning of the term "highway purposes".

Other than the debate over whether any funds should be earmarked for specific purposes, the only issue debated at the Constitutional Convention regarding Const 1963, art 9, § 9 was whether to add the phrase "as defined by law" to the language identifying permitted uses as being for "highway purposes." As discussed below, the addition of this language foreshadowed the events which lead to the 1978 amendment to Const 1963, art 9, § 9.

4. The 1970s Movement To Shift Highway Taxes To Support Public Mass Transportation

In the 1970s, pressure increased on the Legislature to fund public mass transportation projects with highway funds. In 1972, Public Act 326 raised the gasoline tax from 7¢ to 9¢ per gallon and Public Act 327 created the general transportation fund, primarily for public transportation (i.e., mass transit) and appropriated ½¢ per gallon of the gasoline tax to the new

[8] This Court acknowledged the reliability of Convention Comments, given its approval by the general convention. *Regents of University of Michigan*, 395 Mich at 60.

fund. See generally, *Board of Co Road Comm'rs v Board of State Canvassers*, 391 Mich 666; 218 NW2d 144 (1974). In accordance with § 10b(2) of 1972 PA 327; the amount appropriated to the general transportation fund was to be considered an advance from the motor vehicle highway fund to be repaid at such time and in such manner as provided by law.

In 1976, the Legislature enacted Public Acts 295 and 297 to further improve public transportation. Public Act 297 again provided for an annual appropriation from the motor vehicle highway fund to the general transportation fund equal to ½¢ per gallon of gasoline sold. However, 1976 PA 297 did not contain any provision comparable to § 10b(2) of 1972 PA 327 requiring repayment of such appropriations to the highway fund. Thus, 1976 PA 297 raised the issue of whether the use of gasoline taxes for public transportation projects violated the mandate in Const 1963, art 9, § 9 that they be used exclusively for highway purposes as defined by law. In *Advisory Opinion on Constitutionality of 1976 PA 295 and 1976 PA 297*, 401 Mich 686; 259 NW2d 129 (1977), this Court upheld 1976 PA 297 against claims that the use of such funds for public transportation violated Const 1963, art 9, § 9.

This ruling opened the door for the proponents of good roads and the proponents of public transportation to compete for a legislative allocation of all gasoline tax revenues. The Court of Appeals in *Southeastern Michigan Transit Authority v Secretary of State*, 104 Mich App 390, 403-404; 304 NW2d 846 (1981) described the situation, stating:

> In 1976, when the Legislature broadened the definition of highway purposes to include public transportation, rapid transit vehicles, people movement, and railroad cars – this being permitted under article 9, § 9, as it then read – road contractors, suppliers of road building machinery and equipment, and manufacturers of automobiles and auto parts became alarmed that unless article 9, § 9 was amended massive appropriations for mass transportation would be made from the earmarked taxes which traditionally had been used for building and maintaining highways. Conversely, proponents of mass transportation moved to have even greater appropriations made from the earmarked funds.

5. The 1978 Comprehensive Transportation Package, Including Amendment of Const 1963, art 9, § 9

In the late 1970s, at the behest of the then Governor, the Legislature continued its activity to adapt and revise transportation (both highway and public) planning and financing in view of the dynamics of comprehensive transportation. See *County Road Ass'n*, 407 Mich at 106-108. The result was a compromise between the proponents competing for the use of gasoline and other motor vehicle tax revenues. It was a comprehensive package that, among other things, increased the planning focus for public transportation programs and increased taxes and fees by an amount sufficient to provide additional funding for both public transportation and highway purposes. The House Legislative Analysis, First Analysis of House Bill 4408 (increasing the weight tax by 30% to 34%), described the comprehensive legislative program, stating:

> The bill is part of a package of proposed legislation its supporters say would provide the state with a comprehensive transportation program. House Bill 5656 would change the name of the Motor Vehicle Highway Fund to the Michigan Transportation Fund and would establish a State Department of Transportation Fund which would receive money from the gas/diesel fuel tax and the vehicle weight tax, a portion of which would go to support a comprehensive transportation fund (metropolitan bus systems, rail passenger and freight systems, intercity programs, dial-a-ride, small bus systems, and airport improvement programs). House Bill 4407 would increase the tax on gasoline to 11 cents a gallon (it is now 9 cents) and on diesel fuel to 9 cents a gallon (it is now 7 cents), the revenue going to the Transportation Fund. House Bill 5654 would specify that part of the sales tax on auto dealers, parts dealers, and service stations would go to the comprehensive transportation fund. House Bill 4409 would change the name of the Department of State Highways and Transportation to the Transportation Department, and redefine the responsibilities, powers, and duties of the department director and the Highway Commission. House Bill 4410 would amend the Executive Organization Act to change the name of the department, establish job qualifications for the director (at least 5 years of experience in highway or transportation engineering, or possession of an engineering degree), and bring both the Department of Aeronautics and the Aeronautics Commission into the Department of Transportation. House Joint Resolution F would change the name of the Highway Commission to the Transportation Commission, expand the commission to 6 members (from 4), reduce terms from 4 years to 3, specify that the director of the Department of Transportation be appointed by the governor, and delete the requirement that the director be a highway engineer. House Bill 6080 would transfer aviation tax revenues in the aeronautics fund to

> the comprehensive transportation fund. House Bill 6081 would specify that marine gasoline tax revenues continue to go to the Waterways Fund at the present amount (1.25% of all fuel taxes other than the diesel tax collected in 1977), but that anything above that amount go to the comprehensive transportation fund.

See *County Road Ass'n,* 407 Mich at 108-109.

House Bill 5656 created, among other things, the new CTF. House Bill 5654, enacted as 1978 PA 429, allocated a portion of the revenues from motor vehicle sales tax to the CTF.[9] Under House Bill 5656, the CTF would also receive 17.78%, less expenditures for notes and bonds for public transportation purposes, of the amount apportioned to the transportation department.

A key component of this compromise package was House Joint Resolution F, which proposed amendments to Const 1963, art 9, § 9 that (1) limited to 10% the maximum amount of

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[9]MCL 205.75(2), as so amended, provided:

> Of the balance of the general sales tax imposed directly or indirectly on fuels sold to propel motor vehicles upon highways, on the sale of motor vehicles, and on the sale of the parts and accessories of motor vehicles by new and used car businesses, used car businesses, accessory dealer businesses, and gasoline station businesses as classified by the department of treasury in the 1977-78 fiscal year and which is remaining after the allocations and distributions are made pursuant to subsection (1), the following amounts shall be deposited in the state treasury and credited to the comprehensive transportation fund as created by law:
>
> (a) For the fiscal year ending on September 30, 1978, not less than 23.8% of the remaining balance.
>
> (b) For the fiscal year ending on September 30, 1979, not less than 24.3% of the remaining balance.
>
> (c) For the fiscal year ending on September 30, 1980, not less than 24.8% of the remaining balance.
>
> (d) For the fiscal year ending on September 30, 1981, not less than 26.5% of the remaining balance.
>
> (e) For the fiscal year ending on September 30, 1982, not less than 27.9% of the remaining balance.

motor vehicle fuel and weight tax revenues which the Legislature could shift from highway purposes to comprehensive transportation purposes; (2) allocated 100% of aviation fuel revenues to comprehensive transportation purposes; and (3) allowed the Legislature to designate up to 25% of motor vehicle sales tax revenues to be used exclusively for comprehensive transportation purposes. The Court of Appeals in *SEMTA* recognized the role Joint House Resolution F played in this compromise, stating:

> By placing a ceiling on the total or aggregate amount of earmarked revenues which could be diverted to public transportation and similar purposes, the fears of the road building and automobile interests could be allayed. This is precisely what House Joint Resolution F did. It placed a top limit on the amount of money which could be diverted from conventional highway purposes to comprehensive highway purposes. The important point, for purposes of this case, is that the competing interests were concerned with total dollar amounts. They compromised their differences by placing limits in aggregate amounts. Based on the circumstances under which House Joint Resolution F was written and approved by the people, we conclude that article 9, § 9 imposes its limitations in the aggregate and that as long as the SEMTA taxes distributed under § 16a(3) do not exceed 10% of all of the constitutionally earmarked taxes on motor vehicles and motor fuels, § 16a(3) is not unconstitutional.

104 Mich App at 404 (emphasis added); see also *Michigan Road Builders Ass'n v Department of Management and Budget*, 197 Mich App 636, 643-44; 495 NW2d 843 (1992).

Joint House Resolution F became Proposal M on the 1978 general election ballot. At the November, 1978 election, the voters were asked to ratify or reject the proposed constitutional amendment. The descriptive statement below, given all voters pursuant to 1954 PA 116, clearly provided the electorate with a description of the proposed amendment by articulating the elements and conditions of the proposed amendment. In this context, the voters plainly and unambiguously understood that (1) at least 90% of the gas and license tax revenues would be used "exclusively" for general road purposes, and (2) the remainder of the gas and license

revenues, not to exceed 25% of sales tax on cars and parts, would be used "exclusively" for other transportation purposes. The following is the official ballot wording (emphasis added):

PROPOSAL M

PROPOSAL TO ALLOCATE AT LEAST 90% OF GAS TAX REVENUES FOR GENERAL ROAD PURPOSES AND THE REMAINDER FOR OTHER TRANSPORTATION PURPOSES AND TO REPLACE STATE HIGHWAY COMMISSION WITH A TRANSPORTATION COMMISSION

THE PROPOSED AMENDMENT WOULD:

1. Provide that at least 90% of gas and license tax revenue be used exclusively for general road purposes

2. Provide that remainder of gas and license tax revenue and not to exceed 25% of sales tax on cars and parts be used exclusively for other transportation purposes.

3. Limit bonding for roads, streets, bridges and other transportation purposes to amounts to be derived from specific motor vehicle tax and sales tax revenues.

4. Replace State Highway Commission with a nonpartisan State Transportation Commission which shall establish a state transportation policy.

Should this amendment be adopted?

YES ☐

NO ☐

The people of this State approved the amendment to Const 1963, art 9, § 9.

B. Factual Background In This Matter

1. The Intervenors

The MPTA is an association whose members, including AATA, SMART, and CATA: (1) are "eligible authorities" or "eligible governmental agencies" within the meaning of MCL 247.660c(b) and (c); (2) provide "public transportation service" and/or "comprehensive transportation service" within the meaning of MCL 247.660c(h); and (3) are entitled to grants for

a percentage of their "eligible operating expenses" within the meaning of MCL 247.660e(4)(a)(i); and MCL 247.660e(4)(a)(ii). The MPTA represents the interests and views of its members with respect to a wide variety of matters related to public transportation, including funding.

2. The Operation of Const 1963, art 9, § 9

As described above, Const 1963, art 9, § 9 governs the funding of the Michigan Transportation Fund ("MTF") and the CTF. It provides that all specific taxes on fuels sold or used to propel motor vehicles upon highways, to propel aircraft and on registered motor vehicles and aircraft, with the exception of general sales and use taxes, after payment of the necessary collection expenses, be used exclusively for transportation purposes. See, Const 1963, art 9, § 9. In addition, not less than 90% of specific transportation taxes on motor fuel and motor vehicles must be used exclusively for highway transportation purposes. *Id.* Any remainder of those specific transportation taxes is to be used exclusively for comprehensive transportation purposes. *Id.* In addition, all specific transportation taxes on motor vehicle fuel and motor vehicles not used for highway transportation purposes and all specific taxes on aviation fuel must be used exclusively for comprehensive transportation purposes as defined by law. *Id.* Finally, a percentage of the revenue collected from the general sales tax on motor vehicles, motor vehicle fuel, and parts and accessories, must also be used exclusively for comprehensive transportation purposes. *Id.*

3. The MTF and the CTF

The MTF is a separate fund maintained within the State treasury into which constitutionally restricted transportation taxes and fees are deposited for distribution for transportation purposes according to the provisions of 1951 PA 51, as amended, MCL 247.661, *et. seq.* ("Act 51"). The CTF is a separate fund maintained within the State treasury into which

constitutionally restricted transportation taxes and fees from the MTF and other sources are deposited for distribution for transportation purposes according to the provisions of Act 51. Specifically, 10% of the MTF is apportioned to the CTF pursuant to MCL 247.660(1)(f). Certain Michigan public transit authorities are or may be entitled to grants from the CTF of "up to 50%" or "up to 60%" of their respective "eligible operating expenses" pursuant to MCL 247.660e(4)(a)(i) and MCL 247.660e(4)(a)(ii).

4. The Governor's Executive Order

The funding of the CTF, as mandated in Const 1963, art 9, § 9, has been seriously impaired by the actions of the various State Defendants through an Executive Order issued by the Governor's office, purportedly through the Governor's authority under Const 1963, art 5, § 20. Const 1963, art 5, § 20 requires the Governor, in administering the budget after it is adopted, with the approval of the Appropriations Committees of both the House and Senate, to reduce expenditures authorized by appropriations when it appears that actual revenues for the fiscal year will fall below estimates on which appropriations for the fiscal year were based. On November 6, 2001, Governor Engler issued Executive Order 2001-9 (the "E.O."), the stated intent of which was to implement expenditure reductions for fiscal year 2001-2002. See, Exhibit E. The stated authority for issuance of the E.O. was MCL 18.1391. See, Exhibit E. The stated basis for issuance of the E.O. was that expected revenues for the fiscal year 2001-2002 would be below the revenue estimates on which the appropriations for the fiscal year 2001-2002 were based. See, Exhibit E.

The Governor submitted the E.O. to the Appropriations Committees of the Michigan House of Representatives and Senate on November 6, 2001. Both Appropriations Committees approved the E.O. on November 6, 2001. Section 5b of the E.O. unconstitutionally authorizes

the transfer of $12,750,000 of sales tax revenue that funds the CTF to the General Fund, by purporting to amend MCL 205.75 to accomplish the stated transfer.

III. ARGUMENT

A. Standard Of Review

As set forth in *Bratton v DAIIE*, 120 Mich App 73, 79; 327 NW2d 396 (1982), an appellate court will not overturn a trial court's grant or denial of a preliminary injunction save for an abuse of discretion. Stated differently, "[g]ranting or dissolving an interlocutory injunction is discretionary with the trial court; and this court will rarely interfere with the exercise of such discretionary power, and then only upon a showing of a palpable abuse thereof." *Fleming v Heffner & Fleming*, 263 Mich 561, 563-564; 248 NW 900 (1933), citing *Freeman v Mitchell*, 198 Mich 207; 164 NW 445 (1917). As will be demonstrated below, the State Defendants failed to demonstrate that the Trial Court abused its discretion when it issued the preliminary injunction in this case. Nevertheless, the Court of Appeals determined that the Trial Court's decision was a palpable abuse of discretion. This Court should thus grant this Application for Leave to Appeal to correct the erroneous decision of the Court of Appeals on this significant issue of public importance.

B. Standard For Granting Injunctive Relief

The test for the issuance of injunctive relief was concisely stated in *Fruehauf Trailer Corp v Hagelthorn*, 208 Mich App 447, 449; 528 NW2d 778 (1995), as follows:

1. Whether the applicant is likely to prevail on the merits.
2. Whether the applicant will suffer irreparable injury if a preliminary injunction is not granted.
3. Whether harm to the applicant in the absence of a stay outweighs the harm to the opposing party if a stay is granted.
4. Whether the public interest will be served if an injunction issues.

See also, *Michigan State Employees Ass'n*, 421 Mich at 157-58. In this case, the State Defendants have failed to demonstrate that the Trial Court abused its discretion when it determined that each factor weighed in support of the issuance of a preliminary injunction and the Court of Appeals committed a palpable error when in reversed the decision of the Trial Court.

C. The Trial Court Did Not Abuse Its Discretion When It Determined That The Intervenors Were Likely To Prevail On The Merits.

1. The Governor's Authority under Const 1963, art 5, § 20 is Limited.

The Michigan Constitution grants the Governor certain limited powers to reduce expenditures in specific circumstances. Const 1963, art 5, § 20 provides:

> No appropriation shall be a mandate to spend. The governor, with the approval of the appropriating committees of the house and the senate, shall reduce expenditures authorized by appropriation whenever it appears that actual revenues for a fiscal period will fall below the revenue estimates on which appropriations for that period were based. Reductions in expenditures shall be made in accordance with the procedures prescribed by law. The governor may not reduce expenditures of the legislative and judicial branches or from funds constitutionally dedicated for specific purposes. [Emphasis added.]

The Court of Appeals acknowledged that the Governor's power to reduce expenditures is limited under Const 1963, art 5, § 20. Exhibit A, p 3. Indeed, there are several requirements for the proper exercise of this executive power and specific constitutional limitations on its exercise. First, it must appear that actual revenue will fall below the revenue estimate on which appropriations are based. Second, any reduction in expenditures must be made in accordance with the procedures prescribed by law. Third, and most importantly, the Governor is expressly prohibited within the text of Const 1963, art 5, § 20 from reducing expenditures from the legislative or judicial branches or from funds that are constitutionally dedicated for a specific purpose.

In this case, the limitation on the Governor's power that is primarily at issue is his lack of authority to reduce expenditures from any funds that are constitutionally dedicated specifically for comprehensive transportation purposes pursuant to Const 1963, art 9, § 9. While Const 1963, art 5, § 20 was intended to grant the Governor broad powers to reduce expenditures in many areas, the Governor has no authority to reduce expenditures in a way that violates any other provision of the Constitution. *Musselman v Governor*, 448 Mich 503, 519; 533 NW2d 237 (1995). The Governor's authority is thus expressly limited by the terms of art 5, § 20. The Governor's power is also limited by other provisions of the Michigan Constitution and, accordingly, any executive order issued pursuant to Const 1963, art 5, § 20 must not violate Const 1963, art 5, § 20 itself, or any other constitutional provision. The E.O. in this case, however, violates several constitutional provisions including, but not limited to, Const 1963, art 5, § 20 and Const 1963, art 9, § 9.

2. The Funds At Issue Are Constitutionally Dedicated And Are Thus Not Subject To Transfer Under Const 1963, art 5, § 20.

(a) The plain language and operation of Const 1963, art 9, § 9.

The primary issue in this case centers on Const 1963, art 9, § 9 entitled "Use of Specific Taxes on Fuels for Transportation Purposes; Authorization of Indebtedness and Issuance of Obligations." This provision of the Michigan Constitution prescribes the use of specific motor fuel taxes for transportation purposes only. Thus, such funds are constitutionally dedicated funds. See, *County Road Ass'n of Michigan v Michigan Department of Transportation*, 94 Mich App 242, 244; 288 NW2d 382 (1980) ("*CRAM v MDOT*"). Const 1963, art 9, § 9 also prescribes the use of certain taxes for comprehensive transportation purposes only. The CTF is a separate fund maintained within the State treasury into which constitutionally restricted transportation taxes

and fees from the MTF and other sources are deposited for distribution for comprehensive transportation purposes according to the provisions of Act 51.

The authority for the deposit of funds into the CTF stems directly from Const 1963, art 9, § 9, which provides in part:

> The balance, if any, of the specific taxes, except general sales and use taxes and regulatory fees, imposed directly or indirectly on fuels sold or used to propel motor vehicles upon highways and on registered motor vehicles, after payment of necessary collection expense; 100 percent of the specific taxes, except general sales and use taxes and regulatory fees, imposed directly or indirectly on fuels sold or used to propel aircraft and on registered aircraft, after the payment of necessary collection expenses; and not more than 25 percent of the general sales tax, imposed directly or indirectly on fuels sold to propel motor vehicles upon highways, on the sale of motor vehicles, after the payment of necessary collection expenses; shall be used exclusively for the transportation purposes of comprehensive transportation purposes as defined by law. [Emphasis added.]

Thus, constitutionally dedicated funding of the CTF comes from several sources. First, 10% of the MTF is apportioned to the CTF pursuant to Const 1963, art 9, § 9, which is confirmed through MCL 247.660(1)(f). Essentially, because Const 1963, art 9, § 9 mandates that not less than 90% of specific transportation taxes on motor fuel and motor vehicles must be used for highway transportation purposes (and thus is deposited into the MTF), the balance of those specific taxes imposed on the sale of motor fuels (10% of the MTF) is deposited into the CTF. Second, all of the specific taxes imposed on the sale of aircraft fuels, along with no more than 25% of the general sales tax that is imposed on the sale of motor fuels, motor vehicles, and motor vehicle parts and accessories, are deposited into the CTF.

The language of Const 1963, art 9, § 9 is plain and clear – all of the specific categories of taxes shall be used exclusively for comprehensive transportation purposes as defined by law. The Court of Appeal's decision, however, is contrary to the plain language of Const 1963, art 9, § 9 and to settled rules of constitutional construction. The Court of Appeals incorrectly

concluded that Const 1963, art 9, § 9 is "ambiguous" because it "unequivocally exempts all of the general sales tax revenues form the restrictions imposed on specific taxes but then simultaneously subjects up to 25% of the general sales tax revenues to the very same restrictions." Exhibit A, p 5. Essentially, the Court of Appeals erroneously concluded that because the general sales taxes are treated differently from the specific sales taxes, Const 1963, art 9, § 9 is ambiguous. Again, the language of Const 1963, art § 9, § 9 is patently clear.

Obviously, the natural and ordinary meaning of Const 1963, art 9, § 9 is to dedicate the use of revenues subject to its provisions to transportation purposes. It expressly dedicates the use of all revenues subject to its provisions to specific purposes (i.e., transportation purposes). In three separate places, Const 1963, art 9, § 9 expressly states that such revenues "shall ... be used exclusively for transportation purposes...." More specifically, it provides that: (1) not less than 90% of specific taxes and fees on fuel and motor vehicles shall be used exclusively for road, street and bridge purposes; and (2) the balance of such taxes and fees, 100% of revenues from specific taxes on aviation fuel, and up to 25% of revenues from motor vehicle sales taxes, shall be used exclusively for comprehensive transportation purposes.

The words "exclusive" or "exclusively" and "sole" or "solely" are recognized as synonymous. See *Webb Academy v Grand Rapids*, 209 Mich 523, 540-541; 177 NW 290 (1920). The word "shall" is generally construed as mandatory. See *Macomb Co Road Comm'rs v Fisher*, 170 Mich App 697, 700; 428 NW2d 744 (1988). The only possible reasonable understanding of this language in Const 1963, art 9, § 9 is to dedicate the funds subject to its provisions to transportation purposes.

The operative language of Const 1963, art 9, § 9 is the same, or essentially the same, as the language used in two other constitutional provisions dedicating funds to specific purposes.

Const 1963, art 9, § 10 uses the same language (i.e., "shall be used exclusively for...") in dedicating one-eighth of the sales tax to municipalities. Const 1963, art 9, § 11 uses the same language (i.e., "shall be used exclusively for") in dedicating the state school aid fund for aid to school districts. The meaning of this language is plain. It clearly would have been understood by the electorate as dedicating the funds subject to it to the purposes specified.

(b) Any ambiguity in the language of Const 1963, art 9, § 9 must be resolved in favor of the people's understanding and intent.

Even if it were ambiguous, the Court of Appeals' conclusion is directly contrary to the primary rule of constitutional construction, which is to ascertain the common understanding of the people who adopted the provision. Indeed, where the meaning of a constitutional amendment is "ambiguous" or subject to "alternative interpretations," its proper meaning and intent "may be gleaned from the circumstances under which the amendment was written and the purpose sought to be accomplished." *SEMTA*, 104 Mich App at 403, citing, *Traverse City School Dist v Attorney General*, 384 Mich 390, 405; 185 NW2d 9 (1971). Where a constitutional provision is not "free from ambiguity," such a provision must be interpreted "in the light of the purpose sought to be accomplished thereby, and in such manner as to reasonably accomplish this purpose." *Board of Education of City of Detroit v Elliott*, 319 Mich 436, 447; 29 NW2d 902 (1947).

The clear meaning of these provisions is made even more evident by their background and construction prior to the 1978 amendments to Const 1963, art 9, § 9. The language used in the 1978 amendments in this regard is essentially the same as used throughout the history of the various constitutional provisions earmarking funds for highway purposes. As originally ratified in 1938, Const 1908, art 10, § 22, provided that such taxes "shall ... be used exclusively for highway purposes ... and shall not be diverted nor appropriated for any other purpose." The

ballot proposal appearing before the voters in 1938 asked whether "... to guarantee that gasoline ...taxes... be used for highway, roads and streets?" The Attorney General consistently construed Const 1908, art 10, § 22 as dedicating such revenues for highway purposes.

The delegates to the 1961 Constitutional Convention also clearly understood that Const 1908, art 10, § 22 and the proposal before them dedicated or "earmarked" the funds subject to it for a specific purpose. The Committee on Style and Drafting viewed the language "shall be used exclusively for..." so clear as to make redundant the phrase "and shall not be diverted nor appropriated for any other purpose." The Convention Comment to the revised provision was that it "retains earmarking of gas and weight taxes for highway purposes."

This has been confirmed in cases before this Court and the Court of Appeals. For example, in *CRAM v MDOT*, 94 Mich App at 247, the Court of Appeals granted mandamus to prevent the Department of Transportation from financing a vehicle test program with fuel and weight tax revenues. Addressing Const 1963, art 9, § 9, the Court of Appeals stated:

> We are convinced that the language of the newly amended constitutional provision, Const 1963, art 9, § 9, limits the use of the restricted funds to the specific transportation purposes listed therein.

In addition, in *Michigan Ass'n of Counties v Department of Management and Budget*, 418 Mich 667, 678; 345 NW2d 584 (1984), this Court distinguished the Governor's authority under Const 1963, art 5, § 20 to reduce payments under the State Revenue Sharing Act from funds subject to Const 1963, art 9, § 9, stating:

> Plaintiffs' analogy to *County Road Ass'n* is erroneous. We dealt there with a constitutionally dedicated fund, Const 1963, art 9, § 9. The only constitutional provision that directly relates to the appropriation for revenue sharing is contained in Const 1963, art 9, § 10, which mandates distribution of a certain percentage of the sales tax collections to local units of government. This constitutional provision is not at issue and has not been abridged. The special purpose funds to which we referred in *County Road Ass'n* were established pursuant to

constitutional mandate; thus, the rationale of that case may not be applied to legislation which was not so enacted.

The meaning of the language in Const 1963, art 9, § 9 is made even clearer when considered in light of the purpose of the provisions. Const 1908, art 10, § 22 was a direct response by the electorate through initiative petition and ratification at the polls to address the Legislature's failure to prevent the diversion of motor vehicle and fuel taxes and fees from highway purposes. This was not just Const 1908, art 10, § 22's primary purpose, but its only purpose. This was also the primary and sole purpose of Const 1963, art 9, § 9, as originally ratified.

The 1978 amendment to Const 1963, art 9, § 9 basically: (1) reestablished that at least 90% of specific fuel taxes would be used for "highway" (as opposed to broader "transportation" purposes); (2) dedicated 100% of aviation fuel tax revenues to transportation purposes and (3) allowed the Legislature to dedicate portions of the specific fuel taxes (less than 10%) and of motor vehicle sales taxes revenues (not more than 25%) exclusively to transportation purposes. Since the main purpose of Const 1963, art 9, § 9 was to dedicate the revenues subject to its provisions to specific purposes, it is inconceivable that the electorate understood that the 1978 amendment was intended to withhold from the Legislature the authority to dedicate <u>any</u> motor vehicles sales tax revenues exclusively to transportation purposes.

Motor vehicle sales tax revenues are one of the three subjects (i.e., balance of specific fuel taxes, aviation taxes and motor vehicle sales taxes) of the sole sentence in Paragraph 3 of the amended § 9. The State Defendants expressly acknowledged that this sentence of Const 1963, art 9, § 9 constitutionally dedicates "three things" exclusively to comprehensive transportation purposes. The State Defendants argued, however, and the Court of Appeals agreed, that the third "thing" is really nothing (i.e., 0%). Clearly, the voters would not have understood that this third

subject was included in the sentence for the purpose of saying that nothing was being dedicated by it to transportation purposes.

The State Defendants argued, and the Court of Appeals agreed, that because Const 1963, art 9, § 9 places an upper limit on the amount that the Legislature may allocate from the general sales tax to the CTF, somehow the funds lose their standing as "constitutionally dedicated for a specific purpose." As discussed below, however, despite the "upper limit," each source of funding set forth in Const 1963, art 9, § 9 is constitutionally dedicated, and thus none are subject to the Governor's powers under Const 1963, art 5, § 20.

3. The E.O. Places an Illegal Burden on the Self-Executing Constitutional Mandates of Const 1963, art 9, § 9.

The second constitutional violation committed by the Governor through the E.O. is the illegal imposition of additional burdens on Const 1963, art 9, § 9, which is a self-executing constitutional provision. It is well-settled law that additional burdens may not be imposed on self-executing constitutional provisions. *Wolverine Golf Club v Hare*, 24 Mich App 711, 826; 180 NW2d 820 (1970).[10] In this vein, the Court of Appeals held, and this Court affirmed, the following:

> The only limitation, unless otherwise expressly indicated, on legislation supplementary to self-executing constitutional provisions, is that the rights guaranteed...shall not be curtailed or any undue burdens placed thereon.

Id. (internal quotation marks omitted). Indeed, this Court has specifically held that Const 1963, art 9, § 9 and Act 51 are self-executing and make transportation tax legislation unique. *CRAM v Board of State Canvassers*, 407 Mich at 120. For example, Act 51 clearly delineates what the treasurer must do with regard to disbursing the funds and that these duties must be executed regardless of what the appropriation act for the Departments of State Highways and

[10] Affirmed by *Wolverine Golf Club v Hare*, 384 Mich 461; 185 NW2d 392 (1971).

Transportation provided. *Id.* The term "self-executing" is more than an "after-the-fact description" of the operative effect of a constitutional provision. *Wolverine*, 24 Mich App at 728. Rather, it is a term "intended to cloak the provision with the necessary characteristics to render its express provision free from legislative encroachment. And this is so irrespective of the implementing provision contained therein." *Id.* at 728-29 (emphasis added). Thus, the Governor may not, by executive order, encroach on a self-executing constitutional provision such as Const 1963, art 9, § 9.

(a) The Court of Appeals ignored binding and long-standing precedent.

Despite the binding and precedential cases from this Court, the Court of Appeals held that Const 1963, art 9, § 9 was not self-executing, because "legislative action is necessary to appropriate to the CTF." Exhibit A, p 6. However, simply because the Legislature must define comprehensive transportation purposes and may determine that up to 25% of the general sales tax imposed on certain items is to be deposited into the CTF, in accordance with the specific constitutional mandates of Const 1963, art 9, § 9, does not mean that such funding is not constitutionally dedicated. As set forth in *Wolverine*, an implementing provision does not change the nature of a self-executing constitutional provision. For example, before the 1978 amendment, Const 1963, art 9, § 9 provided that all specific motor fuel taxes were to be exclusively used for "highway purposes" as defined by state law. The constitutional amendment changed "highway purposes" to "transportation purposes" and enumerated those purposes in the constitutional provision, eliminating the Legislature's right to define them. *CRAM v MDOT*, 94 Mich App at 244. Also added were the second and third paragraphs of Const 1963, art 9, § 9, including the provisions relating to comprehensive transportation. As was previously the case

with "highway purposes," the Legislature has the authority to define "comprehensive transportation purposes." *Id.* at 245; see also MCL 247.660c(8).

Despite its ruling below, the Court of Appeals in *CRAM v MDOT* previously held that Const 1963, art § 9, § 9 restricts the use of CTF funds. Specifically, in examining whether to issue a writ of mandamus to prevent MDOT from funding a vehicle testing program with funds derived from fuel and weight tax revenues, the Court of Appeals held that the language of Const 1963, art 9, § 9 limits the use of the specified funds to the specific transportation purposes listed therein. *Id.* at 247. The restricted funds may be used only for those purposes set forth therein or for comprehensive transportation purposes as defined by law. *Id.* The Court thus issued a writ of mandamus precluding MDOT from expending funds appropriated for the vehicle testing program from the State Trunkline Fund or the CTF. *Id.* at 248. The present circumstances are nearly identical: the State Defendants may not use CTF funds (because they are constitutionally dedicated) for any other purpose, including transferring them to the General Fund to address a revenue shortfall.

Thus, regardless of the source of funding, the Legislature was barred from using any CTF funds for any purpose not related to comprehensive transportation. The Governor cannot do what the Legislature is barred from doing by virtue of the express limitations of Const 1963, art 9, § 9, despite the authority of Const 1963, art 5, § 20. This is so because the Governor's power is plainly and expressly limited within Const 1963, art 5, § 20 itself: "The governor may not reduce expenditures...from funds constitutionally dedicated for specific purposes." (emphasis supplied). All of the funding for the CTF is constitutionally dedicated. Thus, none may be transferred under Const 1963, art 5, § 20.

(b) There is nothing extraordinary or unusual about the need for legislative action with respect to constitutionally dedicated funds.

As with motor vehicle sales tax revenues, legislative action is required to dedicate any specific fuel taxes to comprehensive transportation purposes. Yet, neither the State Defendants nor the Court of Appeals below claimed that the Constitution dedicates 0% of such specific fuel taxes to comprehensive transportation purposes. Rather, the State Defendants admitted that the amounts determined by the Legislature (up to 10%) are so dedicated. To read the exact same sentence as intending the opposite result for motor vehicle sales taxes is erroneous. Rather, the inclusion of motor vehicle sales taxes in the same sentence that constitutionally dedicates the two other items to comprehensive transportation purposes clearly demonstrates that all three items were so dedicated.

The Court of Appeals' holding flies directly in the face of the sole purpose of the constitutional provisions relating to transportation and comprehensive transportation as it has developed over the last 65 years. It ignores that, in the context of appropriation reductions pursuant to Const 1963, art 5, § 20, Const 1963, art 9, § 9 uses the exact same language as every other constitutional provision dedicating funds for specific purposes. The Court of Appeals' interpretation of Const 1963, art 9, § 9, as essentially having the sole purpose of placing an upper limit on the amount of sales tax revenues that can be apportioned to transportation purposes, is strained at best.[11]

All provisions of Const 1963, art 9, § 9 require some legislation before any funds are subject to their provisions. If the Legislature does not enact (or repeals) the specific fuel and

[11] The reference to "less than 25%" in Const 1963, art 9, § 9, makes its treatment of motor vehicle sales tax revenues consistent with the then (1978) existing statutory distribution of sales tax revenues. Pursuant to MCL 205.75(1), as amended by 1978 PA 429, 15% of sales tax revenues went to local units of government and 60% was transferred to the school aid fund. The balance (25%) was the upper limit incorporated into Const 1963, art 9, § 9.

motor vehicles taxes, there are no funds for Const 1963, art 9, § 9 to mandate be used for exclusively highway purposes. The delegates to the Constitutional Convention clearly understood, and agreed with the proposition, that it was the Legislature's decision whether to increase, maintain, decrease or eliminate the funding to be used exclusively for highway purposes. The mere fact that legislation is required to create the funds encompassed by Const 1963, art 9, § 9 does not contradict Const 1963, art 9, § 9's requirement that the funds so created must be used exclusively for highway or transportation purposes. In fact, that the Legislature has the power to change the amounts to be dedicated to specific purposes by Const 1963, art 9, § 9 was an integral desirable feature of the provision, not one which automatically removed the tax revenues from its scope.

In the same vein, Const 1963, art 9, § 9 does not require that any portion (e.g., minimum percentage or amount) of the specific fuel taxes be used for comprehensive transportation purposes. It is the Legislature's prerogative (subject to the maximum percentage limit in Const 1963, art 9, § 9) to determine the amount, if any, of specific fuel taxes and motor vehicle sales taxes to be allocated exclusively to the CTF. The need for some legislative action to establish the amounts to be allocated and/or apportioned to the CTF is no basis for concluding that Const 1963, art 9, § 9 does not dedicate such legislatively established amounts to that specific purpose.

This construction of Const 1963, art 9, § 9 is supported by the language of Const 1963, art 9, § 11. In addition to providing that certain sales tax revenues shall be dedicated to the state school aid fund, Const 1963, art 9, § 11 provides that "...any other tax revenues provided by law, shall be dedicated to this fund." Clearly the only purpose of this language is to allow the Legislature to dedicate revenues to this fund, thereby "constitutionally dedicating" such revenues to a specific purpose so as to remove them from the Governor's power to reduce appropriations.

(c) The Court of Appeals' construction of Const 1963, art 9, § 9 is contrary to the plain language of this provision, the history of its development, and most importantly, the intent of the people who voted in favor of the 1978 constitutional amendment.

The Court of Appeals' construction of Const 1963, art 9, § 9 is clearly contrary to the purposes and intent of the delegates to the 1961 Constitutional Convention. As expressed by Delegate Cushman, one of the purposes of the convention was to address the fiscal crisis then faced. A primary tool created by the drafters to allow the State to respond to such situations was the Governor's authority to reduce expenditures under Const 1963, art 5, § 20. That power is, however, expressly limited to exclude funds constitutionally dedicated to specific purposes. If dedicated funds were to be reduced, the delegates recognized that it was the Legislature that had various means to do so and the Legislature, not the Governor, had to make such adjustments. The 1978 amendment to Const 1963, art 9, § 9 preserved the Legislature's authority to determine the percentage of motor vehicle sales tax revenues to be allocated exclusively to transportation purposes, which was consistent with the delegates' intent that the Legislature, rather than the Governor, would make such adjustments.

The proper construction of Const 1963, art 9, § 9 basically places the funding of the CTF by motor vehicle sales tax revenues on the same footing as its funding by specific fuel tax revenues. Without implementing legislation, no amounts will be allocated to the CTF from either specific fuel taxes or sales taxes. Const 1963, art 9, § 9 was not intended to remove the Legislature's control in that regard. Rather, a primary purpose of the amendment was to prevent the Governor from transferring revenues from the specifically identified purposes to the General Fund. If any reduction was to come, it was to be by a bill passed by the Legislature, as it did in

1991. See 1991 PA 70. The Court of Appeals' holding eviscerates Const 1963, art 9, § 9 of any force or effect as applied to motor vehicle sales tax revenues.

4. The Governor Exceeded His Authority By Attempting To Amend A Statute Rather Than The Annual Appropriations Bill.

Similarly, the Governor's E.O. violates the Enactment and Presentment clauses of the Michigan Constitution as well as the Separation of Powers clause. The Michigan Constitution vests the legislative power in the Senate and the House of Representatives. Const 1963, art 4, § 1. The Michigan Constitution further provides that "[n]o bill shall become law without the concurrence of a majority of the members elected to and serving in each house." Const 1963, art 4, § 26. In addition, "[e]very bill passed by the legislature shall be presented to the governor before it becomes law." Const 1963, art 4, § 33. These two provisions are referred to as the enactment and presentment requirements of the Michigan Constitution. *Blank v Department of Corrections*, 462 Mich 103, 108; 611 NW2d 530 (2000).

As discussed above, the E.O. exceeded the authority granted the Governor by Const 1963, art 5, § 20, because constitutionally dedicated funds cannot be appropriated or transferred. And, even where a self-executing provision of the Michigan Constitution, such as Const 1963, art 9, § 9, is not at issue, Const 1963, art 5, § 20 simply does not empower the Governor to reduce expenditures in such a way that violates any other provision of the Constitution. *Musselman*, 448 Mich at 519. In this case, the E.O. "transferred" $12,750,000 in sales tax revenue from the CTF to the General Fund by purporting to amend MCL 205.75 to accomplish the stated transfer. The Legislature, pursuant to the constitutional mandate of Const 1963, art 9, § 9, enacted MCL 205.75(4), which is part of the General Sales Tax Act ("GSTA"). Pursuant to this provision of the GSTA, the Legislature determined the division of the 25% of the sales tax revenue from motor fuel sales, motor vehicle sales, and the sale of motor vehicle accessories

referenced in Const 1963, art 9, § 9. It determined that not less than 27.9% of that 25% total must be deposited into the CTF. MCL 205.75(4)(a). Thus, the Legislature determined that approximately 14% of the total sales tax revenue from motor fuel sales, motor vehicle sales, and motor vehicle accessory sales would be deposited into the CTF, in accordance with Const 1963, art 9, § 9, which mandates that no more than 25% of those revenues may be deposited into the CTF.

Through the E.O., however, the Governor purported to amend MCL 205.75(4)(a), by adding the following language:

> For the fiscal year ending September 30, 2002, the amount to be deposited in the comprehensive transportation fund shall be reduced by $12,750,000 and that amount shall be transferred to the unappropriated balance of the general fund for the fiscal year ending September 30, 2002.

Const 1963, art 5, § 20 only allows the Governor to "reduce expenditures authorized by appropriation whenever it appears that actual revenues for a fiscal period will fall below the revenue estimates on which appropriations for that period were based." As set forth in Const 1963, art 5, § 20, reductions in expenditures must be made in accordance with the procedures prescribed by law. Those procedures are set forth in the Management and Budget Act, specifically, Article 3 of that act. See, *International Union, United Automobile, Aerospace & Agricultural Implement Workers of America, UAW, Local 6000 v Michigan,* 194 Mich App 489, 504; 491 NW2d 855 (1992). MCL 18.1391 sets forth the specific procedures that the Governor must follow for this process:

> (1) When it appears to the governor, based upon written information received by the governor from the budget director and the department of treasury, that actual revenues for a fiscal period will fall below the revenue estimates on which appropriations for that period were based, the estimates being as determined by the legislature in accordance with section 31 of article IV of the state constitution of 1963, the governor shall order the director to review all appropriations made by

> the legislature, except those made for the legislative and judicial branches of government or from funds constitutionally dedicated to specific purposes.

Section 391 refers only to the "revenue estimates on which appropriations for that period were based." And, the "estimates" are those determined by the Legislature in accordance with art 4, § 31 of the Michigan Constitution. Const 1963, art 4, § 31 specifically refers to "general appropriation bills for the succeeding fiscal period."

Section 391 refers solely to general appropriations bills submitted by the Governor and passed by the Legislature each year pursuant to Const 1963, art 4, § 31. Likewise, Const 1963, art 5, § 20 clearly refers only to those general appropriation bills based on revenue estimates for a particular fiscal period. Const 1963, art 5, § 20 only grants the Governor the power to "amend" the general appropriations bills. This provision does not authorize the Governor's office to amend any statute it desires, including a provision of the GSTA. This is the only constitutionally permissible result given the Michigan Constitution's mandate found in the legislative powers granted to the Senate and the House of Representatives and in the Enactment and Presentment clauses of the Michigan Constitution.

The purported amendment by Executive Order of MCL 205.75(a)(4) violates the enactment and presentment requirements of the Michigan Constitution and the Separation of Powers clause because the Governor "amended" a law outside the scope of the powers granted by Const 1963, art 5, § 20, without the approval of a majority of the House and Senate. For the Governor's E.O. to be valid with regard to the amendment of the GSTA, it must have been enacted by a majority of both the House and the Senate, not just approved by the respective appropriations committees. The Legislature could not have amended the GSTA without the approval of a majority of the House and the Senate and the Governor is without authority to circumvent this constitutionally mandated process. The Governor's attempt to do so by

Executive Order encroaches on the specific powers granted to the Legislature by the Michigan Constitution and, thus, also violates the Separation of Powers clause.

D. The State Defendants Failed To Raise The Issue Of Severability Below And Are Thus Barred From Raising It On Appeal, And This Argument Is Without Merit.

The State Defendants argued, and the Court of Appeals agreed, that the "offending" portions of the E.O. were severable, which allowed a construction that rendered the E.O. constitutional. Exhibit A, p 8. First, the State Defendants failed to raise the severability argument below and, thus, did not allow the Trial Court an opportunity to pass on the merits. Rather, the State Defendants only argued that the Trial Court should read it in such a way to render it constitutional. But, the issue of severing any language from the E.O. was never raised. See Exhibits F and C, State Defendants' Brief below and hearing transcript. Thus, the State Defendants should be barred from presenting this argument on appeal because the appellate courts of this State have repeatedly declined to address issues not properly raised below. See, *Manning v City of East Tawas*, 234 Mich App 244, 247, n 2; 593 NW2d 649 (1999); and *Grand Blanc Cement Products, Inc v Insurance Co of North America*, 225 Mich App 138, 143; 571 NW2d 221 (1997).

Should this Court choose to pass on this issue, as the Court of Appeals did, Intervenors assert it is without merit, in any event. The State Defendants argue that if the introductory language "by amending Section 25 as follows" was deleted, then the "language that purports to amend MCL 205.75" would be severed. See Exhibit F, State Defendants' Brief at 20-21; Exhibit A, p 8. The State Defendants and the Court of Appeals ignore the fact that even if the language identified was "severed," the effect of the amendment to MCL 205.75 would remain intact, as would the unconstitutional transfer of funds without the approval of the full Legislature.

Moreover, an examination of the legislative history of MCL 205.75 reveals the palpable error in the Court of Appeals' analysis. Subsequent to the ratification of the amendment to Const 1963, art 9, § 9, the Legislature amended the allocation of the sales tax revenues to the CTF several times. Confronted with fiscal challenges facing the State in 1991, the Legislature enacted House Bill 4268, 1991 PA 70, amending MCL 205.75 to provide for a one year reduction in the amount of motor vehicle sales tax revenues to be allocated to the CTF. More specifically, MCL 205.75 provided:

> Sec. 25 (4) For the fiscal year ending September 30, 1988 and each fiscal year ending after September 30, 1988, of the 25% of the collections of the general sales tax imposed at a rate of 4% directly or indirectly on fuels sold to propel motor vehicles upon highways, on the sale of motor vehicles, and on the sale of the parts and accessories of motor vehicles by new and used car businesses, used car businesses, accessory dealer businesses, and gasoline station businesses as classified by the department of treasury remaining after the allocations and distributions are made pursuant to subsections (2) and (3), the following amounts shall be deposited each year into the respective funds:
>
> (a) Not less than 27.9% to the comprehensive transportation fund. **However, for the fiscal year ending September 30, 1991 only, the amount to be deposited in the comprehensive transportation fund shall be reduced by $1,500,000.00.** [Amended provision in **BOLD**.]

The House Legislative Analysis Section, Second Analysis for House Bill 4268 (as enrolled) stated:

> As a short-term strategy to ease the current budget problems, it has been suggested that a portion of the auto-related sales tax collections otherwise allocated to the comprehensive transportation fund instead be required to lapse to the general fund at the end of the fiscal year.
>
> * * * * *
>
> ...Without the bill, state funding of public transportation would be immune to budget cuts.

Obviously, the State knows how to properly and constitutionally reduce the funds to be deposited into the CTF. This time, however, the State failed to do so in a way that did not violate multiple

provisions of the Michigan Constitution. Thus, the State Defendants' severability argument is completely without merit and the Court of Appeals' decision in this regard was in error.

E. The Trial Court Did Not Abuse Its Discretion When It Determined That The Intervenors Would Be Irreparably Harmed If An Injunction Did Not Issue.

The second factor examined by the Trial Court when it considered whether to issue a preliminary injunction was the danger that the Intervenors would suffer irreparable harm if the injunction was not issued. *Fruehauf, supra.* The Court of Appeals did not address this issue. Exhibit A. Members of the MPTA, including AATA, SMART, and CATA, are public transit authorities entitled to grants from the CTF of "up to 50%" or "up to 60%" of their respective "eligible operating expenses." An unconstitutional reduction in that overall funding by $12,750,000 has and will cause irreparable harm to the Intervenors and other members of the MPTA. Intervenors' ability to fund their operating expenses and provide quality comprehensive transportation services to the public will be irreparably impaired if a preliminary injunction does not issue precluding the State Defendants from transferring funds from the CTF pursuant to the E.O.

The State Defendants argued that any harm to the Intervenors is not irreparable because it can be remedied by an award of money damages. Simply because constitutional violations in this case relate to "funding" does not mean that money damages can remedy the harm to Intervenors. In fact, the multiple constitutional violations cannot be remedied by money damages at all.

First, Intervenors sought only injunctive and declaratory relief. Intervenors do not seek money damages from the State. Instead, they want the State to return the constitutionally dedicated funds to the CTF for distribution in accordance with the Constitution, Act 51, and the

GSTA.[12] Even if Intervenors could obtain money damages from the State Defendants (which they are not seeking), the unconstitutional use and transfer of constitutionally dedicated funds would remain unremedied. Moreover, the unconstitutional amendment of legislation by Executive Order cannot be remedied by money damages. Thus, the issue of money damages is simply a red herring.

F. The Trial Court Did Not Abuse Its Discretion When It Determined That The Harm Caused By Defendants' Unconstitutional Actions And Harm To The Public Interest Was Significant And Far Outweighed Any Harm To Defendants Caused By Requiring Their Compliance With The Mandates Of The Michigan Constitution.

The Trial Court properly considered the harm to the public interest and the State Defendants have failed to show that the Trial Court abused its discretion in determining that this factor weighed in favor of issuing an injunction. The Court of Appeals did not address this issue. Exhibit A. The State Defendants argue that the Trial Court did not properly consider the issue of the public interest because it gave no weight to the Governor's obligation to balance the budget and thus, somehow, "abused its discretion." State Defendants' Brief at 5. The Trial Court held:

> The interest to the public to whom comprehensive transportation services are provided and who enacted Const 1963, art 9, § 9 will be served by insuring that the funds in question are protected while the Court determines the merits of this controversy. [Exhibit C]

Specifically, the State Defendants argue that the Trial Court's conclusion is "unwarranted and incomplete" and "disregarded" the Governor's duty to balance the budget. State Defendants'

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[12] Indeed, if Intervenors sought money damages from the State, this matter would have been brought in the Court of Claims. MCL 600.6419; see also, *Watson v Michigan Bureau of State Lottery,* 224 Mich App 639; 569 NW2d 878 (1997) (a complaint raising claims against State or its agencies and seeking only money damages must be filed in Court of Claims, but a complaint seeking only equitable or declaratory relief must be filed in circuit court). This Complaint was not brought in the Court of Claims and the State Defendants have never alleged that this case was improperly brought in the Ingham County Circuit Court or moved to dismiss or transfer on that basis. Indeed, Plaintiffs have brought a companion suit in the Court of Claims to which Intervenors are not a party.

Brief, p 5. Admittedly, the State Defendants' conclusion rests on its erroneous assumption that Const 1963, art 9 § 9 is not implicated in this case. It attempts to short-circuit its erroneous assumption by arguing that the Trial Court should have "weighed" and "balanced" the constitutional rights found in Const 1963, art 9 § 9 and Const 1963, art 5 § 20. But the State Defendants incorrectly assume that these two constitutional provisions are "conflicting." They are not, and thus, there is no need to "weigh" or "balance" them.

The State Defendants simply ignore the Trial Court's conclusion that the Governor's specific actions with regard to the constitutionally dedicated funding for CTF were unconstitutional and expressly prohibited by the very constitutional provision from which the Governor's authority stems, Const 1963, art 5, § 20. Contrary to the State Defendants assertions, the Trial Court did not give "greater" weight to Const 1963, art 9, § 9. Again, there was simply no need to "balance" the constitutional rights found in Const 1963, art 5, § 20 and Const 1963, art 9, § 9 because they are not "conflicting." Const 1963, art 5, § 20 specifically provides that: "The governor may not reduce expenditures of the legislative and judicial branches or from funds constitutionally dedicated for specific purposes." (Emphasis added.) Thus, by finding the funds constitutionally dedicated for a specific purpose, the Trial Court determined that they were expressly excluded from the Governor's constitutional authority to reduce expenditures found in Const 1963, art 5, § 20.

Rather than engaging in the erroneous analysis proposed by the State Defendants, the Trial Court appropriately considered the risk that the Intervenors would be harmed more by the absence of an injunction than the State Defendants would be by the granting of the injunction along with the harm to the public interest if the injunction is issued. *Fruehauf, supra.* In passing on a request for preliminary injunctive relief, the Trial Court properly considered the competing interests

of the parties. Thus, the State Defendants have failed to show that the Trial Court abused its discretion when it determined that this factor weighed in favor of issuing the preliminary injunction.

The State Defendants also argue that because Intervenors cannot claim that they have been deprived of the entire $12,750,000, the Trial Court had no legitimate basis for weighing the harm to the parties. The State Defendants have pointed to no requirement in the law that Intervenors must prove such an entitlement to be granted a preliminary injunction to enjoin the blatantly unconstitutional actions of the State Defendants. Moreover, such a requirement would mean that every person or entity potentially harmed by the unconstitutional transfer[13] must be joined in this suit for the Court to grant a preliminary injunction. There is no such requirement and the State Defendants point to no authority in support of their position. Essentially, if the State Defendants' position were accepted, no one harmed by the unconstitutional actions of the State could ever seek relief, unless all persons harmed by that unconstitutional actions were joined in the suit. No such requirement is found in the law for obvious reasons.

In addition, one of the Intervenors, the MPTA, represents a variety of members, including AATA, SMART, and CATA, that: (1) are "eligible authorities" or "eligible governmental agencies" within the meaning of MCL 247.660c(b) and (c); (2) provide "public transportation service" and/or "comprehensive transportation service" within the meaning of MCL 247.660c(h); and (3) are entitled to grants for a percentage of their "eligible operating expenses" within the meaning of MCL 247.660e(4)(a)(i); and MCL 247.660e(4)(a)(ii). The MPTA represents the interests and views of its members with respect to a wide variety of matters related to public transportation, including funding. Finally, as discussed above, the Intervenors do not seek

[13] Whether they must be specifically "entitled" to some portion of the $12,750,000 or whether they need only be a beneficiary of the funds is not clear from the State Defendants' argument.

recovery" of the $12,750,000. Rather, they only seek the return of the funds to the CTF, in accordance with the requirements of the Michigan Constitution, so that funds can be distributed in accordance with Const 1963, art 9 § 9 and applicable statutes.

As discussed above, the Trial Court did not abuse its discretion when it determined that an unconstitutional reduction in the overall funding of the CTF by $12,750,000 has and will cause irreparable harm to the Intervenors, to other members of the MPTA, and the public to whom they provide comprehensive transportation services. The Trial Court properly determined that the rights of Intervenors in the constitutionally dedicated funding would be best preserved by the issuance of a preliminary injunction. Moreover, the Trial Court also properly determined that the interest of the public to whom comprehensive transportation services are provided and who enacted Const 1963, art 9, § 9 would be served by ensuring that these constitutionally dedicated funds are protected while the Trial Court determines the merits of this controversy. Thus, the actions of the Trial Court in issuing the preliminary injunction ensured that the public interest would be served.

The State Defendants have simply failed to establish that the Trial Court abused its discretion with regard to this factor when it issued the preliminary injunction.

IV. CONCLUSION

For the reasons set forth above, Intervenors respectfully request that this Honorable Court grant the Intervenors/Appellants' Application for Leave to Appeal.

Respectfully submitted,

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Dated: February 24, 2004

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